IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Yashwant Kumar vs. Smt. Kunta Bai

S.B. Civil Misc. Appeal No.556/2003 against the judgment and decree dated 16.9.1999 passed by the learned Addl. District Judge No.1, Chittorgarh in Civil Misc. Case No.137/94.

Date of Judgment : November 27 ,2006.

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. S. L. Jain for the appellant.
Mr. Sandeep Saruparia for the respondent.

BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

The marriage of the appellant and respondent took place in the year 1979. They lived together upto 21.2.1988. According to the appellant, since the behaviour of the respondent with appellant was not good since time of marriage, there were usual quarrels between the appellant and the respondent. According to the appellant the respondent used to go to her parents

house at Mandsore without taking permission of the applicant and normally in absence of the appellant. Because of this, there was mental tension for appellant. He tried to resolve the dispute raised by the respondent but on 21.2.1988, when appellant was on duty, the respondent left the house of the appellant with her three children and went to Mandsore. Since then the respondent is living at Mandsore. The appellant tried his best to bring back the respondent but he failed in his efforts. According to the appellant, the respondent's mother and father are also not interested in sending the respondent to the house of the appellant. Compelled by this situation, the appellant submitted a petition under Section 9 of the Hindu Marriage Act, 1955 on 28.4.1989 which is registered as Case No.76/89. Despite that effort, the respondent did not come to the appellant. According to the appellant, respondent's father had one power loom factory at Mandsore. The appellant's children started working in that factory, therefore, the respondent's parents to take benefit of the situation, kept the respondent and appellant's children so that the respondent's parents can use the respondent and appellant's children for earning. However, admittedly the petition under Section 9 of the Hindu Marriage Act, 1955 was withdrawn by the appellant and thereafter, he filed the present divorce petition under Section 13 of

the Hindu Marriage Act, 1955 before the court below. The appellant sought decree for divorce on the ground of desertion and mental cruelty and on the ground that the respondent did not re-establish the relations with the appellant despite filing of the petition by the appellant under Section 9 of the Hindu Marriage Act, 1955 on 28.4.1989.

The respondent-wife of the appellant submitted reply to the divorce petition and stated that their marriage took place in the year 1979 and out of this wedlock, she gave birth to two daughters and one son. She admitted that upto 1986, she lived with the appellant at Chittorgarh. Upto this period there was no dispute between the appellant and the respondent. Before going to Chittorgarh, the appellant and respondent were living at Udaipur because of the employment of the appellant in the General Hospital at Udaipur. After appellant's transfer from Udaipur to Chittorgarh, he developed illicit relation with one lady nurse Nalini, who was also working in the General Hospital at Chittogarh. The appellant even brought Nalini in the house and started living with her as husband and wife, which was seriously opposed by the appellant and because of this reason, the relation of the appellant and respondent became unhappy. The appellant started beating respondent and started giving inhuman treatment to the respondent. Initially the

respondent tried to bear with the situation but she could not tolerate it. The respondent stated that in case the appellant is ready to leave the said lady Nalini, she is still ready to live with the appellant. So far as the petition under Section 9 of the Hindu Marriage Act, 1955 is concerned, according to the respondent, that petition was filed only to take benefit of the legal provision and the appellant never intended to keep the respondent with him. Because of third persons' entry in the house of the appellant and the respondent, the situation compelled the respondent to live separate from the appellant. It is submitted that the respondent and his father and other relations tried to persuade the appellant to leave the nurse Nalini but all efforts failed. The appellant even started beating his two daughters and son also and, therefore, the situation compelled her not to live with her husband.

In the trial court, issues were framed in the light of the pleadings of the parties and the issues were, whether the respondent left the appellant on 21.2.1988 without any reasonable cause, whether the respondent treated the appellant cruely even since before 21.2.1988, whether no relationship of appellant and respondent established after the appellant's filing petition under Section 9 of the Hindu Marriage Act, 1955 on 28.4.1989.

The appellant gave his statement as PW-1 and produced witnesses PW-2 Bal Krishna who is father of the appellant, PW-3 Nand Ram relative of the appellat, PW-4 Durgesh Bharti, friend of the appellant, PW-5 Shashi Kant Chaturvedi, an acquaint of the appellant. The defendant gave her statement as DW-1 and produced witnesses DW-2 Laxmi Naranin who is close relation of appellant but appeared as witness of the respondent, DW-3 Hari Om, the respondent's brother, DW-4 Satya Narayan who is co-brother in relation of the appellant because of marriage of DW-4 with sister of the respondent.

The appellant produced copy of the application filed under Section 9 of the Hindu Marriage Act, 1955 as Ex.1, reply to the application under Section 9 of the Hindu Marriage Act, 1955 as Ex.2, copies of the order-sheet in the proceedings under Section 9 of the Hindu Marriage Act, 1955 as Ex.3, copy of the reply filed by him under section 125, Cr.P.C. Proceedings as Ex.4. The respondent produced Ex.A-1 letter written by the appellant's relative Laxmi Narain dated 1.3.1994, Ex.A-2 letter dated 15.11.1993 alleged to have been written by the nurse Nalini, Ex.A-3 envelop in which she received the letter of Nalini dated 15.11.1993, Ex-A-4 the letter written by Bal Krishna, close relative of the appellant dated 5.3.1988, Ex.A-5 the letter of the appellant dated 6.2.1987, Ex.A-6 letter of the

respondent dated 17.2.1988, Ex-A-7 respondent's letter sent by post with seal with date 18.2.1988, Ex.A-8 respondent's letter dated 20.1.1986, Ex.-A-9 respondent's letter dated 22.1.1988 and Ex.A-10 statement recorded under Section 125, Cr.P.C.

The trial court while deciding issue no.1 and 3 held that from 21.2.1988 to February, 1994 or nearby this period, the lady named Nalini who was working as nurse was living with the appellant and the appellant developed illicit relationship with that lady. For this period, the respondent was not ready to live with the appellant. When the said lady Nalini left the house of the appellant in the month of February,1994, the respondent has shown her willingness to live with her husband-appellant. Therefore,the respondent had a reasonable cause to live separate from the appellant. The trial court while deciding issue no.2 held that till the appellant and respondent lived at Udaipur, there was no dispute between the appellant and respondent and they were living happily. The appellant was transferred to Chittorgrarh from Udaipur and because of this reason, the respondent had to live at Udaipur so that the appellant and respondent's children may complete their studies at Udaipur. After transfer of the appellant from Udaipur to Chittorgarh, he developed illicit relations with nurse Nalini. The appellant failed to prove allegation of any ill-

treatment by the respondent of the appellant or his family members. While deciding these two issues, the court below considered the oral statements as well as documentary evidence produced by the parties and further the fact of filing the petition under Section 9 of the Hindu Marriage Act, 1955 by the appellant against the respondent and its withdrawal by the appellant. The trial court because of the reasons mentioned in the judgment and decree dated 16.9.1999, dismissed the appellant's petition filed under Section 13 of the Hindu Marriage Act, 1955. Hence this appeal by the appellant husband of the respondent.

The learned counsel for the appellant vehemently submitted that the respondent levelled absolutely false allegations against the appellant. Her behaviour with the appellant was bad since the time of marriage and the appellant tried his best to console the respondent but he failed. The respondent used to leave the house of the appellant without informing any body. She created mental tension for the appellant and ultimately left the house for ever on 21.2.1988. The appellant to bring the respondent back in the home of the appellant, submitted petition under Section 9 of the Hindu Marriage Act, 1955 and when the appellant felt satisfied that the respondent is not willing to come to the house of the appellant, he got his petition under Section 9 of the Hindu Marriage Act, 1955 dismissed. It

is submitted that the appellant produced the copy of the petition under Section 9 of the Hindu Marriage Act, 1955 and even the order-sheets of the said proceedings from 23.5.1989 to 21.5.1994. The appellant also produced the witnesses who had full knowledge about the acts of the respondent. It is also submitted that the respondent herself admitted that the petition under Section 9 of the Hindu Marriage Act, 1955 was filed by the appellant. It is submitted that leveling false allegation of illicit relation with other lady by the respondent, is a serious cruelty against the appellant.

The learned counsel for the appellant further submitted that it is clear case of irretrievable breakdown of the marriage of the appellant and the respondent because of the reason that admittedly the appellant and respondent are living separate since 21.2.1988 and the period of 18 years have passed. Hon'ble the Apex Court in the case of Naveen Kohli vs. Neelu Kohli (2006 AIR SCW 1550) observed that irretrievable breakdown of marriage should be made ground for divorce and the law of divorce based on fault is inadequate. Hon'ble the Apex Court even directed the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act to meet with this contingency and in another judgment of the Hon'ble Apex Court delivered in the case of Durga Prasanna Tripathy v. Arundhati Tripathy (2005 CDR 552

(SC), the Hon'ble Apex Court, after taking note of the fact that there is no chance of reunion or reconciliation between the parties, observed that the marriage between the parties had irretrievably broken down and thereafter confirmed the decree for divorce passed by the Family Court.

The learned counsel for the appellant further vehemently submitted that the court below committed serious error of law in reading the order-sheets Ex.3 produced by the appellant from the proceedings under Section 9 of the Hindu Marriage Act. It is submitted that the court below was under impression that on the basis of the facts mentioned in para 26 of the judgment of the court below, both the parties were present and reconciliation proceedings were taken and on 21.5.1994 when the appellant and the respondent both were present, the appellant submitted an application for withdrawal of the petition under Section 9 of the Hindu Marriage Act, 1955.

I considered the submissions of the learned counsel for the parties and perused the statements of all the witnesses as well as the documents placed on record.

It is not in dispute that the marriage of the appellant and the respondent took place in the year 1979 and out of this wedlock, three children born. From

1979 to 1986, there is allegation of the appellant that there was ill-treatment of the appellant by the respondent. She used to quarrel but for the said quarrel, from 1979 to 1986, the appellant is seeking divorce in the year 1994 by filing this petition. Admittedly, during this period, three children born to the appellant and the respondent. The allegation of cruelty from time of marriage to 1986 against the respondent are absolutely vague and the pleading is totally insufficient. There is no narration of the fact about any specific incident of cruelty upto the period of 1986 in the divorce petition. Not only this but the appellant himself submitted a petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights in the court on 28.4.1989 and he did not choose to seek decree for divorce on the ground of cruelty upto the period of 1986 from 1979. Therefore, firstly the appellant's claim on the basis of such allegation deserves to be dismissed for want of sufficient pleading and secondly because of his conduct of living with the respondent as husband and wife and it is not a case of the appellant that during this period from 1979 to 1986, there was no physical relationship between the appellant and the respondent and contrary to it, out of their wedlock, three children born, is an admitted fact. Even if the evidence of the parties are looked into, it is clear

that the statements of the appellant and his witnesses with respect to any ill-treatment by the respondent upto 231.2.1988, are not constituting any case of cruelty against the respondent. In view of the above, the finding on issue no.2 is upheld for the reasons mentioned above and for the reasons given by the trial court in detail and which has not been very seriously contested by the appellant.

The appellant filed the divorce petition on 3.5.1994. Before that the appellant submitted a petition under Section 9 of the Hindu Marriage Act, 1955 on 28.4.1989. In the proceeding under Section 9 of the Hindu Marriage Act, 1955, the respondent submitted reply to the petition on 4.12.1993. In the reply, the respondent categorically stated that the appellant developed illicit relationship with one nurse Nalini and because of that reason, the appellant started harassing the respondent and started beating respondent and her children. He turned out the respondent and her children and they are living with respondent's father's family. The proceedings for reconciliation were going on before the court below, cannot be disputed in view of the copies of the order-sheets produced by the appellant himself. However, according to the learned counsel for the appellant, the court below under impression that the appellant himself was not present on some of the dates before the court

in the proceedings under Section 9 of the Hindu Marriage Act and he deliberately withdrawn the petition under Section 9 of the Hindu Marriage Act, 1955, whereas in fact on some of the dates mentioned by the court below, the respondent was not present. Respondent sought time for filing the reply. The appellant withdrawn the petition under Section 9 of the Hindu Marriage Act, 1955 because he was satisfied that the respondent is not willing to live with him, therefore, he filed divorce petition.

The argument raised by the appellant cannot help appellant in any way because of the simple reason that an issue was raised by the respondent in the petitioner under Section 9 of the Hindu Marriage Act and the respondent tried to show her excuse for her living away from the appellant, the appellant withdrawn the petition under Section 9 of the Hindu Marriage Act, 1955. Interestingly, despite serious allegation of illicit relation of appellant with the nurse Nalini, the appellant in the divorce petition, has not mentioned any fact of said allegation leveled by the respondent against the appellant nor he sought decree for divorce on the ground of leveling false allegation against the appellant by the respondent of illicit relationship. The allegations if were false, were of grave character but the appellant in his entire divorce petition, has not stated that that allegation is a

false allegation. The above facts clearly show that when the respondent took upon herself to prove the allegation of illicit relation of appellant with nurse Nalini, the appellant withdrew his petition filed under Section 9 of the Hindu Marriage Act, 1955. And when the appellant filed the divorce petition, he did not state that that allegation is false allegation. The appellant without pleading wants to submit that the allegations levelled by the respondent against the character of the appellant, are false. Not only this but that allegation is being sought to be pressed as ground for divorce as the character assignation of the husband by the wife as a mental cruelty and that too without pleading. The appellant failed to disclose any reason for not contesting the respondent's allegation, which was in his knowledge about the character of the appellant and further failed in denying the allegation in his divorce petition which were in his knowledge from before his filing divorce petition.

It appears from Ex.4, copy of the reply of the appellant filed in proceedings initiated by the respondent under Section 125, Cr.P.C. that the appellant after denying his illicit relationship with the nurse Nalini, stated that there is no nurse named Nalini (in para no.3 of the reply). This reply was filed by the appellant on 27.6.1988. Contrary to the stand taken by the appellant in his reply to the

application under Section 125,Cr.P.C., in his statement in the court in this divorce petition, in cross-examination, the appellant admitted that the nurse Nalini was working with him as member of the staff.

The trial court considered the letters written by the respondent which are placed on record by the respondent. One of the letters is letter written by none else than the father of the appellant himself and this letter is admitted letter, which is Ex.A.4, in which the appellant's father informed the respondent's father that the respondent's father took right step by taking away respondent from the house of the appellant. He even requested the respondent's father to console the respondent and told her not to worry for the problem. The appellant also produced a letter alleged to have been written by none else than the said lady nurse Nalni which according to the respondent, she received this letter through post. The letter Ex.A-2 and envelop Ex.A-3 were produced by the respondent. The appellant admitted that nurse Nalini was his staff member then he could have produced said lady nurse Nalini as witness to deny the fact and the allegation levelled by the respondent. One of the letters Ex.A-5 was written by the appellant himself to the respondent's brother Hari Om wherein there is mention of one fact that the police person came to him and enquired about one girl and, therefore, he may help in

getting the statement of respondent before the Investigating Police Officer Sarnam Singh. In view of the above facts it is clear that the trial court not only considered the documents referred above but also considered the other documentary evidence along with oral statements of the witnesses produced by the parties and reached to the conclusion that till the appellant and respondent lived at Udaipur upto 1986, there was no dispute. The dispute arose when the appellant was transferred to Chittorgarh from Udaipur where he developed illicit relationship with one lady nurse Nalini. The respondent, because of this reason only, started living separate from the appellant. Therefore, the court below has not committed any error of fact or law in holding that there was just cause for respondent's living separate from the appellant and the respondent has not deserted the appellant.

So far as the request for passing the decree for divorce on the ground of irretrievable breakdown of the marriage of the parties is concerned, it is true that Hon'ble the Apex Court upheld the divorce decree in the case of Durga Prasanna Tripathy (supra) and while affirming the finding of the Family Court, observed that there is no possibility of appellant and respondent of re-establishing the normal marital life. The Hon'ble the Apex Court also observed that the marriage between the parties had irretrievably broken

down but in that case there is a clear finding upheld by the Hon'ble Apex Court is that the appellant had proved before the Family Court both the factum of separation as well as animus deserendi which are the essential elements of desertion. Contrary to it, in present case, the appellant failed in proving any allegation against the respondent and the respondent has fully proved her willingness to live with her husband and also fully proved excuse for her living separate from her husband and further proved that she bonafidely willing to live with husband as the cause for living separate from the appellant has disappeared and she is ready to condone the sin of appellant.

In the case of Naveen Kohli (supra), Hon'ble the Apex Court clearly held that irretrievable breakdown of marriage is no ground for divorce under Section 13 of the Hindu Marriage Act and it should be made a ground for divorce. Admittedly the law has not been amended. Be it as it may be, the question arises is that whether principle of molding of relief by decree for divorce on the ground of irretrievable breakdown of marriage is available to a person who failed to prove all the allegations levelled by him in his divorce petition and when the respondent proved by cogent evidence her excuse for leaving the husband ? In my opinion, the relief of divorce cannot be granted in such situation where the respondent-non-applicant has shown reasonable

cause and excuse for her not living with the husband. The causes may be several and if the court reaches to the conclusion that the respondent has right to live separate from the appellant then granting relief of divorce on the ground of desertion will be a finding contrary to the finding recognising the right of the respondent-non-applicant to live separate from the applicant. Not only this but Section 23(1)(a) of the Hindu Marriage Act specifically provides that decree for divorce cannot be passed in favour of person who himself has committed wrong. The fact of irretrievable breakdown can be considered in a case where there are allegations and counter allegations and there are some evidence of fault of both the parties. The marriage of Hindu cannot be dissolved unilaterally by any of the parties to the marriage. Therefore, in a case where non-applicant has proved her/his right to live separate from the applicant, if a decree for divorce is granted on the ground of desertion then that will be not only a punishment to the person honest to relation for none of his or her fault but will be reward to the wrong doer and which is prohibited by law under Section 23(1)(a) of the Hindu Marriage Act. In the present case, this Court has no hesitation in holding that the appellant by withdrawing the petition under Section 9 of the Hindu Marriage Act, when the respondent tried to prove her reasonable excuse from withdrawal from the society

of the appellant by taking burden upon herself as required by explanation to Section 9 of the Act of 1955, the appellant did not allow her to prove said ground by withdrawing the petition under Section 9 of the Hindu Marriage Act. Be it as it may be, in the divorce petition, the respondent proved her case for living separate from the appellant and not only this but after the end of the cause for her living separate, she offered to live with the appellant-husband. In such situation, the decree for divorce cannot be granted on the abstract plea that the marriage has breakdown irretrievably. It is not a case of even irretrievable breakdown of marriage because till 1989, the appellant himself sought relief of restitution of conjugal rights and by that time, about 20 years have passed to the marriage. From 1988 to 1994, for six years, the appellant and respondent are living separate because of the availability of reasonable cause with the respondent. The respondent clearly shown her willingness to live with the respondent and the appellant was found guilty of having illicit relations with a lady Nalini.

For a man or woman, marriage is not only contractual relation in Hindu Law and not contractual relationship in the eyes of their society. For a lady, the marriage gives her a status in the society. It is also matter of pride for the lady. Such status and

pride cannot be lightly taken away when she is not guilty of any misconduct. The lady against whom a decree for divorce is granted by the court of law may have to face several social problems. The situation is gravest when in court of law, the lady proves her all bonafides and honesty towards relations and further proves that the husband was dishonest to relations and still such lady is asked to live as divorcee. In the present case, there are three children of the appellant and the respondent and they also have to live in the society and in case, they live with honour of their mother's married status, that may be their pride also. In the facts of this case, as observed above, granting decree of divorce will be not only unjust but contrary to law and will be against the public policy of making efforts for reconciliation of marital relationship where the dispute may arise during long period of married life.

In view of the above, I do not find any merit in the appeal of the appellant and the respondent cannot be deprived of her status as of a married lady.

The appeal of the appellant is ,therefore, dismissed with cost.

(PRAKASH TATIA) ,J.

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